Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States
October Term, 1995

MARGUERITE V. KUNKES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in determining the reasonableness of a governmental regulation which requires the owner of property to pay a fee as a condition to continued ownership of that property, the amount of the fee imposed must be compared with the financial ability of the owner to make payment, rather than the value of the property on which the fee is imposed in "regulatory takings" cases.

2. Whether the Fifth Amendment to the United States Constitution requires payment of just compensation for the value of unpatented mining claims which were forfeited because of the financial inability of the holder of such claims to pay a claim rental fee imposed by Congress on each claim.

3. Whether the Judgment of the United States Court of Appeals for the Federal Circuit is in conflict with the prior holdings of this Court in its determination that the claim rental fee imposed by Congress on each of the unpatented mining claims held by petitioner was inherently reasonable and, therefore, petitioner herein was not entitled to compensation under the Fifth Amendment to the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARGUERITE V. KUNKES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Marguerite V. Kunkes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra,* 1 - 15) is reported at 78 F.3rd 1549. The opinion of the United States Court of Federal Claims (App., *infra,* 16 - 30) is reported at 32 Fed. Cl. 249.

JURISDICTION

The court of appeals entered its judgment on March 15, 1996 (App., *infra,* 31). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States of America provides, in relevant part, "... nor shall private property be taken for public use, without just compensation."

The Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub.L.No. 102-381, 106 Stat. 1374, 1378 (1992) (hereinafter referred to as "Appropriations Act") provides, in relevant part:

> [N]ot withstanding any other provision of law and effective upon the date of enactment of this Act, for fiscal year 1993, for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 ...
>
> [F]or fiscal year 1994, for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e) and filing requirements of FLPMA (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay an annual claim rental fee of $100 per

> claim to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the following assessment year beginning at noon on September 1: Provided further, That in fiscal year 1994, each claimant . . . (ii) that is performing exploration work to disclose, expose, or otherwise make known possible valuable mineralization on ten or fewer claims under a valid notice or plan of operation; and that has less than ten acres of unreclaimed surface disturbance from such mining activity or such exploration work, may elect to either pay the claim rental fee for such year or in lieu thereof do assessment work required by the Mining Law of 1872 (30 U.S.C. 28-28e) and meet the filing requirements of FLPMA (43 U.S.C. 1744 (a) and (c)) on such ten or fewer claims and certify the performance of such assessment work to the Secretary by August 31, 1993 . . .

The Mining Law of 1872, 30 U.S.C. §28-28(e), is reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioner, together with her late husband, filed suit in the United States Court of Federal Claims, seeking just compensation under the Fifth Amendment for loss of certain unpatented mining claims which they had formerly, jointly held. The Court of Federal Claims granted summary judgment for the United States and dismissed the Complaint. Petitioner appealed the decision of the Federal Claims Court to the United States Court of Appeals for the Federal Circuit, which affirmed the summary judgment granted by the Court of Federal Claims.

A. STATEMENT OF FACTS

Between 1969 and 1991, Charles R. Kunkes and Marguerite V. Kunkes established approximately 573 contiguous unpatented mining claims in Mohave County, Arizona.[1] All of petitioner's unpatented mining claims had been validly located and established under the Mining Act of 1872, 30 U.S.C. §28-28(e) (hereinafter referred to as the "Mining Act").

Under the Mining Act, once a claim was validly located and staked, all that was necessary to continue holding the claim was the performance of $100 work of "assessment work" during each assessment year, which began at noon on September 1 of each year and concluded at noon on September 1 of the following year. This requirement for performance of assessment work had been fully satisfied on all of petitioner's claims through and including the assessment year ending September 1, 1993.

On October 5, 1992, Congress enacted the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1374, *et seq.* (hereinafter referred to as the "Appropriations Act."). Under the Appropriations Act, the obligation imposed upon owners of more than ten unpatented mining claims, in order to continue holding their claim, was changed from the provision of assessment work having a value of $100 per year per claim, for the assessment year ending September 1, 1993, plus a claim rental fee of $100 per claim for the assessment year ending September 1, 1994, all of which was due and payable on or before August 31, 1993. Failure to pay the claim rental fee was deemed to conclusively constitute

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[1]All of the unpatented mining claims referred to herein were owned jointly by Charles R. and Marguerite V. Kunkes at the time of initiating this action. However, in the interim, Charles R. Kunkes has died, and Marguerite V. Kunkes is the only petitioner in this case.

abandonment of the claims. The total claim rental fee due from petitioner on August 31, 1993, was thus approximately $115,000.[2] Petitioner was unable to afford payment of the claim rental fee imposed by the Appropriations Act, and her claims were, therefore, lost.

B. PROCEEDINGS BELOW

On December 21, 1993, petitioner filed her Complaint in the United States Court of Federal Claims, pursuant to the Tucker Act, 28 U.S.C. §1491 (1988), asserting that forfeiture of her unpatented mining claims constituted a taking of her property, for which she was entitled to just compensation under the Fifth Amendment to the Constitution of the United States. The United States filed a Motion for Summary Judgment, together with Suggestions in Support, which essentially asserted that the claim rental fee imposed by the Appropriations Act is a reasonable regulatory restriction on the continued ownership of petitioner's claims, and, therefore, the forfeiture of the claims did not constitute a taking, as a matter of law. Petitioner filed a Cross-Motion for Partial Summary Judgment on the taking issue only.[3]

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[2]Five hundred seventy-three (573) claims times $200 per claim equals $114,600.

[3]Petitioner's Motion for Summary Judgment and Memorandum in Opposition to Defendant's Motion for Summary Judgment are included in the Appendix filed with the United States Court of Appeals for the Federal Circuit in this case at pages 52-172 (any future references to the Appendix filed in the Court of Appeals shall hereinafter be referred to as A__). Attached to petitioner's Motion for Summary Judgment as Exhibit "B" and "C" were the reports and affidavits of registered professional geologists, which indicate that the value of the minerals located on petitioner's former claims had an in-ground value in excess of $86,000,000, with several specific areas not yet fully evaluated. (A99-148). These appraisals were obtained after the Complaint was filed in the United States Court of Federal Claims.

The United States Court of Federal Claims heard oral argument on the Cross-Motions for Summary Judgment on September 9, 1994, and on October 31, 1994, filed its Opinion, in which it found that the forfeiture of petitioner's claims did not constitute a taking, and dismissed her Complaint. In its Opinion, the Court found that the claim rental fee was an inherently reasonable regulatory restriction. In reaching its conclusion, the Court compared the amount of the fee to the value of petitioner's former claims, rather than to the ability of petitioner to pay the fee, relying principally upon the decisions of this Court in *Texaco, Inc. v. Short*, 454 U.S. 516, 70 L. Ed.2d 738, 102 S. Ct. 781 (1982), and *United States v. Locke*, 471 U.S. 84, 85 L.Ed.2d 64, 105 S. Ct. 1785 (1985).

Petitioner appeals the decision of the Court of Federal Claims to the United States Court of Appeals for the Federal Circuit under 28 U.S.C. §1295 (a) (3). The Court of Appeals affirmed, holding that the principles enunciated in *Texaco* and *Locke* govern. The Court of Appeals found that the claim rental fee served a legitimate governmental purpose and determined that it was a reasonable restriction on the retention of petitioner's former claims. In reaching that determination, the Court of Appeals also compared the claim rental fee to the value of the claims rather than the subjective financial ability of the holder to pay the fee, relying upon *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 94 L.Ed.2d 472, 107 S. Ct. 1232 (1987) (App. 12-13).

REASONS FOR GRANTING THE PETITION

As the Opinion of the United States Court of Federal Claims acknowledged, "The present facts carry the issue beyond either *Locke* or *Texaco*." (App. 26). The Court of Appeals asserted that no authority exists to support a subjective approach to measuring

the reasonableness of the regulatory restriction created by the claim rental fee. Petitioner respectfully suggests that to the extent this Court has not yet decided the issue directly, this case presents a much needed and timely opportunity for the Court to decide the important questions presented. Moreover, petitioner respectfully submits that the Opinion of the Court of Appeals is erroneous in that it appears to conflict, at least in principal, with the prior opinions of this Court in regulatory takings cases with respect to the test which should be applied in determining the reasonableness of the regulation.

I. THE JUDGMENT OF THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As noted previously, the trial court acknowledged that the facts of this case carry the issue of determination of the reasonableness of the governmental regulation beyond either *Locke* or *Texaco* (App. 16). The trial court did, however, accept at face value that petitioner could not have paid the fee herself (App. 17), and that there was no neglect on petitioner's part in failure to pay the fee because she was personally unable to pay the entire amount (App. 26). Thus, it seems uncontroverted that it was **impossible** for petitioner to comply with the governmental regulation imposed upon her, at least out of her own resources.

It has been suggested by the United States Court of Federal Claims and the Court of Appeals that other alternatives were available to petitioner to raise the funds with which to satisfy the claim rental fee. However, there has never been any documentation in the record of any alternative available to petitioner to raise the funds with which to pay the fee. It is important to note that the appraisals attached to the Motion for Partial Summary Judgment

filed by petitioner with the Court of Federal Claims were not obtained until after commencement of this action. Thus, as of the time on which the payment of the claim rental fee was due, petitioner was not possessed of the information regarding the estimated value of the claim, and the information was not available for use to attempt to secure alternative financing of the claim rental fee.

It has also been suggested that petitioner could have made an election under the Appropriations Act to retain the ten most valuable of her claims and abandon the rest. This, however, begs the question. The principal issue presented in this case is whether a governmental regulation, which changes the petitioner's obligation from one which she previously could afford to one which she could not, constitutes a taking. Even assuming that petitioner had an obligation to abandon all but the ten most valuable of her claims, there would still be a taking of the other 563 claims for which just compensation should be required under the Fifth Amendment.

It is fundamental that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322, 43 S. Ct. 158, 160 (1922). It is also uncontroverted that unpatented mining claims constitute private property within the meaning of the Fifth Amendment. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 9 L.Ed.2d 350, 83 S.Ct. 379 (1963); *United States v. Locke*, 471 U.S. 84, 85 L.Ed.2d 64, 105 S.Ct. 1785 (1985).

In determining whether a taking, requiring compensation under the Fifth Amendment, has occurred, this Court has identified three factors which have particular significance: (1) The economic

impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 109, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978). Under *Locke, supra,* this Court held that "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with the reasonable regulatory restrictions the legislature has imposed." *Id.* at 107.

Thus, in order to determine whether a taking occurred in this case, it was incumbent upon both the trial court and the Court of Appeals to determine whether the regulation was reasonable. In doing so, both the trial court and the Court of Appeals compared the burden imposed by the claim rental fee to the value of the unpatented mining claims formerly owned by petitioner, rather than to the financial ability of petitioner to pay the fee, and concluded that the fee was inherently reasonable. Petitioner respectfully submits, however, that the proper measure for determination of the reasonableness of a governmental regulation, which consists of payment of a monetary fee in order to retain property, would be a comparison of the amount of the fee with the subjective financial ability of the holder to pay the fee.

The Court of Appeals noted that it was unable to locate any authority for the test advanced by petitioner. Petitioner respectfully submits, however, that she is unaware of any other case in which the governmental regulation consisted of the requirement of payment of a cash fee, which the holder was unable to pay, in order to retain the property. To that extent, petitioner respectfully submits that the Court of Appeals has decided an important question of federal law which has not yet been, but should be,

settled by this Court.

The approach taken by the Court of Appeals seems to disregard the economic reality of modern society. The Court of Appeals compared the amount of the fee to the value of the claims to be lost and concluded that the fee was inherently reasonable. Petitioner respectfully submits that no fee is reasonable if it is beyond the ability of the owner of the property to pay. Indeed, where the owner lacks the ability to pay the fee, or otherwise comply with a governmental regulation, the greater the value of the property to be lost, the more unreasonable the fee or other regulations becomes. Petitioner may urgently and earnestly desire to pay the fee or otherwise comply with the governmental regulation, but if she lacks the financial resources to do so, the value of the property to be lost is of little consequence. Where, as here, the holder of an unpatented mining claim cannot afford to pay the claim rental fee, the fact that the claims lost have a value in excess of $86,000,000 does not make the fee more reasonable than if those same claims had a value of only $10,000,000. Indeed, the converse is true.

The approach taken by the Court below leaves the citizens of the United States subject to the risk of loss of property due to imposition of a regulation with which they are subjectively unable to comply . It only seems reasonable, therefore, that to protect those citizens in their Fifth Amendment rights, this Court should adopt a subjective test to the determination of the reasonableness of the governmental regulation.

For these reasons, the decision below has decided an important question of federal law which has not yet been, but should be, settled by this Court. This Court should, therefore, grant certiorari to review these important questions.

II. THE JUDGMENT OF THE COURT OF APPEALS IS IN CONFLICT WITH THE PRIOR HOLDINGS OF THIS COURT.

Although, as noted in the preceding section of this Petition, the precise question presented has not yet been addressed by this Court, it nonetheless appears that the rationale of the Court of Appeals, as well as the trial court, in deciding this question is in conflict, at least in principal, with some of the prior decisions of this Court.

As noted previously, in *Pennsylvania Coal, supra,* one of the three factors identified by this Court as having particular significance in the determination of the reasonableness of the governmental regulation is the economic impact of the regulation on the claimant. This factor was recognized both in *Locke, supra,* and in *Texaco, supra.* This factor clearly seems to be a subjective test. By rejecting petitioner's assertion that the reasonableness of the claim rental fee should be determined by comparison of petitioner's subjective ability to pay the fee, the Court of Appeals appears to have departed from the principals suggested by the case.

The Opinion of the Court of Appeals also seems to erroneously suggests that takings claims should not be decided on a case-by-case analysis (App. 12). However, it has long been recognized in taking jurisprudence that these cases do not lend themselves well to the development of any set formula. Instead, the courts have traditionally relied on *ad hoc*, factual determinations on a case-by-case basis. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 89 L. Ed.2d 166, 106 S. Ct. 1018 (1986); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 81 L.Ed.2d 815, 104 S.Ct. 2862 (1984); *Kaiser Aetna v. United States,* 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979).

Thus, the suggestion of the Court of Appeals that the case-by-case analysis and subjective standard urged by petitioner is unworkable would seem to be in conflict, at least in principal, with the holdings in these cases.

The decision of the Court of Appeals also seems to be in conflict with the holding in *Keystone Bituminous Coal Ass'n. v. DeBenedictis, supra.* In its Opinion, the Court correctly noted that, generally, the reasonableness of a burden imposed by a regulatory restriction is measured by assessing the impact of the regulatory restriction against the value of the property remaining. The Court of Appeals then erroneously concluded that the trial court had complied with the holding of *Keystone* "by evaluating the $100 yearly fee against the appraised value of appellants' mineral claims." (App. 13). However, in *Keystone*, this Court held:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." 480 U.S. 470 at 497.

Thus, the appropriate application of the *Keystone* test, when applied to the facts of this case would result in a fraction, the numerator of which is in excess of $86,000,000, and the denominator of which would be zero. The fraction actually reached by the trial court, and approved by the Court of Appeals, would have a numerator of approximately $115,000 and a denominator of in excess of $86,000,000. It would therefore appear that the judgment of the Court of Appeals is erroneously in conflict with the test set forth in *Keystone*.

The judgment of the Court of Appeals would also seem to be somewhat in conflict with the holding of this Court in *Dolan v. Tigard,* 129 L.Ed.2d 304 (1994), 114 S. Ct. 2309. There, the test was whether the exaction had a "nexus" to the identified harm caused by the proposed development, and whether the exaction was "roughly proportional" to that harm. Here, the only harm identified by the Court was the existence of stale mining claims and perceived lack of ability to obtain centralized collection of up-to-date information on the status and worth of unpatented mining claims by federal land managers (App. 11). By definition, claims having a value in excess of $86,000,000 which had hitherto been held by the annual performance of the assessment work required by the Mining Act, would not constitute stale claims. Thus, as to petitioner's claims, there does not appear to be any harm. Certainly the loss of claims with a value in excess of $86,000,000 does not appear to be roughly proportional to any harm associated with the implementation of the subjective test urged by petitioner for determination of the reasonableness of the claim rental fee. To the extent that the Court below rejected the use of the subjective test, it would appear that the judgment of the Court of Appeals is in conflict with the holding in *Dolan, supra.*

For the reasons stated herein, petitioner respectfully submits that this Court should grant certiorari to review the apparent conflicts between the judgment of the Court of Appeals and the prior holdings of this Court referred to herein.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

The questions presented in this case are of extreme importance for several reasons. First and foremost is the importance of this decision to the utilization of public lands, the importance of which was recognized in *U.S. v. Coleman,* 390

U.S. 599, 20 L.Ed.2d 170, 88 S. Ct. 1327 (1968). As the trial court noted in Footnote 7 of its Opinion (App. 21), petitioner alleged in this case that prior to August 31, 1993, there were over 1.1 million unpatented mining claims located on public lands in the United States. After that date, approximately 75 percent of those claims, numbering more than 850,000, were lost by reason of non-payment of the claim rental fee. Although the original material documenting these facts is not in the record, they have never been denied or disputed by the government.

Further, as noted in Footnote 5 of the Opinion of the Court of Appeals (App. 4), the claim rental fee requirement has been extended at least through 1998. Thus, there may have in the interim been, and there could well in the future be, additional unpatented mining claims lost as a result of inability of the holders of those claims to pay the claim rental fee. Also, Congress could very easily extend the claim rental fee beyond 1998 and could, in fact, raise the fee to any other arbitrary figure it might select, resulting in the loss of even more unpatented mining claims as a result of inability of the holders to pay the claim rental fee.

The importance of this case is not limited to unpatented mining claims cases. Congress could, at any time, in an effort to reduce the federal deficit, impose fees of any sort on other forms of property owned by the citizens of the United States. It is therefore very important to determine whether the reasonableness of these fees is to be determined based upon the subjective ability of the owner of the property to pay the fee, or otherwise comply with a governmental regulation, and to determine whether the Opinion of the Court of Appeals below is in conflict with the prior holdings of this Court.

In addition to the foregoing, the questions presented are important questions from the standpoint of the value of the claims lost. As noted previously, the appraisals of the gold and silver deposits contained within the unpatented mining claims formerly owned by petitioner have been appraised in excess of $86,000,000. While that figure is not conclusive, and those appraisals were only attached to petitioner's Motion for Partial Summary Judgment to establish the existence of valuable minerals, they do give some insight as to the possible range of the loss in this case.

Finally, and perhaps most significantly, is the importance of this case to the fundamental right of the citizens of the United States to be safe and secure in their Fifth Amendment rights. The founders of this country attempted to insure that no citizen would ever be deprived of property by the government without just compensation. It is fundamentally unjust for the government to change the nature of the regulatory obligations, necessary to the continued retention of property, from one which the holder or owner of the property could satisfy to one which the holder or owner of the property could not possibly satisfy, resulting in a divestiture of the property. That is precisely what the Fifth Amendment was designed to prevent, and is precisely what has occurred here.

For these reasons, the importance of the determination of the questions presented to this Court cannot be understated and therefore, certiorari should be granted for their consideration by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-5031

CHARLES R. KUNKES AND
MARGUERITE V. KUNKES,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Decided: March 15, 1996

Before RICH and PLAGER, *Circuit Judges,* and COWEN, *Senior Circuit Judge*. PLAGER, *Circuit Judge*.

This case arises under the Takings clause of the Fifth Amendment to the Constitution.[1] By legislation enacted in 1992, Congress required that in order to retain their unpatented mining claims, claim holders must pay a per-claim annual fee of $100 for each of the years 1993 and 1994. This cash payment requirement replaced a prior requirement that the claim holders perform $100 worth of exploration and development work yearly on those claims. Appellants Charles and Marguerite Kunkes, who owned a number of these unpatented mining claims, failed to pay the amount required by the new legislation. Under the terms of the fee statute, nonpayment results in conclusive deemed abandonment of the claims and corresponding forfeiture to the Government. Appellants take the position that the new requirement

[1] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

has worked a taking of their property without just compensation in violation of the Fifth Amendment, and sued the United States for $575 million in compensation for their losses resulting from the forfeiture of the claims. The Court of Federal Claims held that forfeiture of appellants' unpatented mining claims for failure to pay the statutory fee did not work a taking, and dismissed.[2] Appellants challenge that decision here. We affirm.

BACKGROUND

To encourage private development of mineral deposits, federal law permits private parties to discover, explore, and reclaim mineral deposits in federally-owned lands. 30 U.S.C. § 22 (1994) ("[A]ll valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . . under regulations

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[2] *Kunkes v. United States*, 32 Fed. Cl. 249 (1994). There is some question as to precisely what disposition the Government sought, and what the court granted. The Government filed a cross-motion for summary judgment in which it moved the trial court "to grant summary judgment against the plaintiffs," but then asserted that "Plaintiffs have failed to state a claim upon which relief can be granted and, therefore, their complaint must be dismissed." The decision of the trial judge in this case was that "the defendant's [Government] motion for summary judgment is granted;" but the judgment was for dismissal. A summary judgment motion under Rule 56 calls for judgment on the merits of the cause in favor of the moving party. Dismissal of the complaint rather than entry of judgment in favor of the defendant is proper when the defendant moves under Rule 12(b) (6) asserting that the complaint on its face fails to state a claim for which relief may be granted. Unlike a Rule 12(b) (6) motion, a summary judgment motion does not simply test the sufficiency of the complaint; it involves examination of material outside the complaint, and determines whether on the undisputed facts presented in that material, the movant is entitled to judgment as a matter or law. *See* Fed. R. Civ. P. 12(b), (c); Fed. R. Civ. P. 56. Accordingly, for purposes of the appeal we treat the matter not as a dismissal but as an entry of judgment in favor of the Government.

prescribed by law."); *see also* 30 U.S.C. § 21a (1994).[3] The Mining Act of 1872, 30 U.S.C. § 26, provides that "[t]he locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, . . . so long as they comply with the laws of the United States . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth . . . ." 30 U.S.C. § 26.

Thus federal law permits private parties to acquire exclusive possessory interests in federal land for mining purposes, interests which entitle claim holders to extract and sell minerals without paying royalties to the government. *See United States v. Locke*, 471 U.S. 84, 86 (1985). Title to the underlying fee simple estate in the land remains in the United States. These possessory mineral interests are known as "unpatented" claims to distinguish them from the ownership interest of the private owner who has obtained a "patent," that is, an official document issued by the United States attesting that fee title to the land is in the private owner.[4] *See generally*, Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1 (1987). Even though title to the fee estate remains in the United States, these unpatented mining claims are themselves property protected by the Fifth Amendment against uncompensated takings. *See Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *cf. Forbes v. Gracey*, 94 U.S. 762, 766 (1876).

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[3] Unless otherwise stated, all citations are to the 1994 edition of the United States Code.

[4] The current statutory purchase price for fee title to the land is $5.00 per acre. 30 U.S.C. § 29. Congress has made some effort recently to raise the price to fair market value. *See* David Rogers, "Miners Win Senate Victory on Land Claims," *Wall St. J.*, Aug. 9, 1995, at A10.

Under the Mining Act of 1872, unpatented mining claimholders could maintain ownership of their claims by performing $100 of assessment work or providing $100 of improvements for each claim during each year (referred to as the "assessment year"). An Act to Promote the Development of the Mining Resources of the United States, ch. 159, § 5, 17 Stat. 91, 92 (1872) (codified at 30 U.S.C. § 28). In 1976, Congress passed the Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782), which further required unpatented mining claimholders to file annually a notice of intention to hold the claim, an affidavit of the assessment work performed on the claim, or a BLM reporting form. 43 U.S.C. § 1744(a). Failure to comply with the filing requirement "shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner." 43 U.S.C. § 1744(c).

In 1992, Congress passed appropriations legislation for the Interior Department, which substituted a $100 per claim "maintenance fee" for the $100 of assessment work requirement, for the 1993 and 1994 assessment years. Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106 Stat. 1374, 1378 (1992) ("Appropriations Act").[5] Claimholders were required to pay the 1993 and 1994 maintenance fees by the end of the 1993 assessment year. Failure to pay the fee "shall conclusively constitute a forfeiture of the unpatented mining claim . . . by the claimant and the claim shall be deemed null and void by operation of law." 30 U.S.C. § 28i.

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[5] Congress has extended the fee requirement through 1998. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title X, Subtitle B, § 10101, 107 Stat. 312, 405 (codified at 30 U.S.C. § 28f(a) (1988 & Supp. 1993)). Holders of 10 or fewer claims may continue to provide assessment work in lieu of the fee. 30 U.S.C. § 28f(d) (1988 & Supp. 1993).

Between 1969 and 1992, appellants located and filed 573 unpatented claims to minerals beneath public lands in Mohave County, Arizona. During that time, appellants provided affidavits attesting to their provision of $100 of assessment work per claim per year, and complied with all other requirements of the Mining Act and FLPMA. However, appellants did not pay the claim maintenance fee for 1993 and 1994, which totalled roughly $115,000 for the 573 claims, asserting that they could not afford to do so. Accordingly, their claims were deeded abandoned.

Appellants sued the government in the court of Federal Claims, asserting that the forfeiture of their claims constituted an uncompensated taking. The trial court granted summary judgment for the government. *Kunkes v. United States*, 32 Fed. Cl. 249 (1994). The trial court found that although unpatented mining claims are property rights protected by the Fifth Amendment, under the principles of *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), and *United States v. Locke*, 471 U.S. 84 (1985), Congress may impose reasonable conditions on their retention without effecting a taking. 32 Fed. Cl. at 252-54. The trial court found that Congress had broad power in this regard, due in part to the fact that Congress created the rights at issue and, until patented to the claimant, the government owns the fee title to the land on which the claims are located. *Id.* at 254. Further, the trial court found that claimholders had always been subject to some proof of interest in developing mineral resources, that the maintenance fee did not effect a substantial difference in the claimholders' obligation, and that the fee was motivated by the legitimate governmental desire to eliminate stale or worthless claims as encumbrances on public lands. *Id.* at 255. The trial court concluded that a $100 fee, measured against valuable mineral deposits (appellants cited an appraisal of their deposits at more than $80 million), was not unreasonable, and may be employed by Congress

to require claimholders to evaluate whether the claims are sufficiently valuable to warrant their retention. *Id.* The trial court concluded therefore that abandonment of appellants' claims resulting from nonpayment of the statutory fee did not work a taking.

The trial court accepted appellants' assertion that due to their limited personal income, shown to be in the neighborhood of $35,000 annually, they could not themselves pay the total fees due, but found that this did not render the fee unreasonable. The court noted that appellants could have borrowed on the value of the claims, abandoned or sold less promising claims, or obtained third party funding for the fees. *Id.*

Appellants appealed to this court. We have jurisdiction over the appeal under 28 U.S.C. § 1295(a)(3).

DISCUSSION

The trial court correctly found that the principles enunciated in *Texaco* and *Locke* govern this case, and properly applied them to find no taking in these circumstances. In *Texaco*, the State of Indiana had enacted legislation providing that mineral interests that were unused for 20 years would be extinguished automatically and revert to the surface land owner, unless the mineral interest owner filed a statement of claim with the county recorder of deeds within 2 years of the statute's passage. The statute did not require any specific notice to the mineral owners before a statutory extinguishment of their interests.[6]

Owners of severed mineral interests alleged, *inter alia*, that the statute deprived them of property without due process and

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[6] The mineral interests at issue in *Texaco* were created from privately owned, rather than federally owned, land. See *Texaco*, 454 U.S. at 521.

effected a taking without just compensation. *Id.* at 522-23. The Supreme Court upheld the constitutionality of the statute and found no taking. The Court first found that the state had the power to extinguish mineral interests created by it if the owners did not meet the conditions outlined in the state statute. "We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." 454 U.S. at 526. The Court reasoned that communities historically had the power to permit the reversion of abandoned property interests, noting that the Court consistently had upheld recording and limitations statutes which resulted in such reversions. *Id.* at 526-29.

The Court then found that the state had not acted arbitrarily -- the statute only considered mineral interests abandoned if no production had been performed, no rent or royalties had been collected, and no taxes had been paid, for 20 years, *and* the owner did not record a statement of claim within 2 years after the statute's passage. *Id.* at 529. The Court further found that the statutory conditions furthered the legitimate state goals of identifying and encouraging development of mineral interests, and collecting property taxes. *Id.* at 529-30 ("The State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State.").

The Court found that extinguishment of the mineral interests did not effect a taking because the Fifth Amendment did not require the government to compensate property owners who failed to preserve their property interests by "tak[ing] reasonable actions imposed by law." *Id.* at 530 ("It is the owner's failure to

make any use of the property -- and not the action of the State -- that causes the lapse of the property right; there is no "taking" that requires compensation.").

In *Locke*, the Supreme Court applied the principles of *Texaco* to uphold the constitutionality of section 314(c) of the FLPMA, which provided that any unpatented mining claim for which annual filing requirements were not met would be conclusively deemed abandoned. The Lockes had made the required filings one day late, and the government had deemed their claims forfeited. The Lockes argued, *inter alia*, that such forfeiture constituted an uncompensated taking in violation of the Fifth Amendment.

The Court disagreed. The Court observed that Congress' power to condition the retention of unpatented mining claims, a "unique form of property," *Locke*, 471 U.S. at 104 (quoting *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963)), was especially broad, for two reasons. First, the claimholders take their claims with the knowledge that the government, as owner of the underlying fee title, maintains broad regulatory powers over the use of the public lands on which unpatented mining claims are located. Second, unpatented mining claims consist of "the right to a flow of income from production of the claim," and thus are "held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out . . . ." *Id.* at 105. Therefore, the Court concluded, Congress may condition initial receipt of unpatented mining claims, and also may apply conditions to vested claims (such as appellants' claims) when retroactive application is a rational means of achieving a legitimate legislative purpose. *Id.*

In *Locke*, the Court found that requiring existing claim

holders to make annual filings served Congress' legitimate goal of ridding federal lands of stale claims and compiling updated information on the status of outstanding claims. *Id.* The Court stated:

> Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.

Id. at 104 (citations omitted). The Court found that the filing requirements imposed "the most minimal of burdens" on claimholders and were a reasonable restriction on claim retention. *Id.* at 107. The Court concluded that application of the filing requirements to vested claims did not effect a taking under the Fifth Amendment. "Regulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." *Id.* at 107.

Appellants argue that neither *Texaco* nor *Locke* controls this case because those cases both involved "neglect" by the claimholders in not fulfilling statutory requirements for retention of their claims. In this case, as the Court of Federal Claims acknowledged, appellants did not neglect to pay the claim maintenance fees; rather, they consciously did not pay the fees, because they allegedly could not afford to do so. Thus they pose the question as one of a straightforward taking of private

property -- the mining claims -- over the objection of the owners.

The parties correctly treat this case as a regulatory taking claim. It is the failure by appellants to comply with the otherwise valid regulatory requirements of the law that causes the forfeiture, and the vesting in the United States, the holder of the underlying fee estate, of their previously-owned interests including the right to possession of the surface. Even the government's physical occupation of property as an incident to enforcement of the law does not ordinarily convert a regulatory taking case into one of physical occupation. See *California Housing Securities, Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992).

Appellants' regulatory takings approach is consistent, moreover, with the Supreme Court's analysis, particularly in *Locke*, which invoked familiar regulatory takings concepts such as "reasonable investment-backed expectations" and the reasonableness of the measure causing the deprivation. *Locke*, 471 U.S. at 107. Although unpatented mine claims are "fully recognized possessory interests," *id.*, they partake more of the character of use rights. Title to the land remains with the United States, and the unpatented mining claim holder has the right to use the government's fee simple estate for mining purposes. The Government created such rights expressly to promote that particular use of its property, i.e., development and extraction of the mineral deposits.

Recent cases have demonstrated the need to tailor the test for regulatory takings to the specific context of the case. *Compare, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), a case involving the imposition of additional restrictions on existing land uses, in which the Court described three important factors, "the economic impact of the regulation

on the claimant..., the extent to which the regulation has interfered with distinct investment-backed expectations..., [and] the character of the governmental action," with *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), a case involving subdivision exactions, in which the test was whether the exaction had a "nexus" to the identified harm caused by proposed development and whether the exaction was "roughly proportional" to that harm; and *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), a case involving a regulatory imposition that denied any economic use of the land, and in which the test included the question of whether the State's common law of nuisance principles would have authorized the imposition.

In this case, there is little question that the regulatory imposition, including the annual $100 fee, serves the legitimate governmental purpose of ridding federal lands of stale mining claims, and providing for centralized collection by federal land managers of comprehensive and up-to-date information on the status and worth of these claims. *See Locke*, 471 U.S. at 105-06. In this situation, as noted above, "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." *Id.* at 107. The question, then, is whether the claim maintenance fee is a reasonable condition on the retention of unpatented mining claims.

Although appellants emphasize that, unlike in *Locke* and *Texaco*, their noncompliance did not result from neglect, the gravamen of *Locke* and *Texaco* is that no taking occurs through automatic forfeiture of unpatented mining claims when the claim holder fails to comply, through neglect or otherwise, with a reasonable condition on the retention of her claims, which

condition is imposed to serve a legitimate governmental purpose.

In this case, the trial court found that the claim maintenance fee was reasonable essentially because (1) it differed only in nature, not in value, from the prior assessment work requirement; and (2) compared with valuable mineral claims, the fee amount was not disproportionate and was in fact "inherently reasonable." 32 Fed. Cl. at 255. Although appellants "accept the untrammeled right of Congress to impose a requirement of payment of a claim rental fee, in cash, as a condition to continued ownership of unpatented mining claims," they disagree that the fee is reasonable. They argue that the $100 per claim fee for $100 worth of assessment work was "radically different in kind and degree" from the prior assessment work requirement, primarily because after the fee was imposed, appellants were no longer able to maintain their claims without outside assistance. Appellants contend that takings claims are decided on a case-by-case, intensely factual basis, and therefore "[t]he determination [as to whether the fee is reasonable] cannot be made by comparison of the claim rental fee to the value of the claims; it must be made by comparison of the claim rental fee to the holder of the claim's ability to pay."

Appellants cite no authority, and we have found none, to support their subjective approach to measuring the reasonableness of a condition imposed by Congress on the retention of unpatented mining claims. Certainly no such standard emerges from *Texaco* or *Locke*. In *Locke*, for example, the Court stated that regulatory burdens imposed on mining claimholders are reasonable if they are "not so wholly disproportionate to the burdens other individuals face in a highly regulated society." 471 U.S. at 107 n. 15. Regulatory takings law generally measures the "reasonableness" of a burden by assessing the impact of the regulatory imposition

against that value of the property remaining. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-506 (1987). The trial court did essentially that in this case, by evaluating the $100 yearly fee against the appraised value of appellants' mineral claims.

Appellants' subjective standard is unworkable as well as unprecedented. It would be difficult to argue that all persons who had the money to pay the fees at sometime during the 1993 assessment year, or even earlier, but then spent it on a car or a child's college tuition or lost it gambling, and therefore could not pay the fee at the appointed hour, suffered a taking upon forfeiture of their claims. Otherwise, claimholders could readily escape the fee requirement. Appellant's test therefore would require the trial court to sort out meritorious from meritless takings claims by inquiring as to the nature of each claimant's financial circumstances and why that claimant could not afford the fee. Nothing in takings law justifies imposing such a standard.

Appellants' reliance on *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), is misplaced. In *Whitney*, the property owner owned coal mining rights on property in an alluvial valley floor. The Surface Mining Control and Reclamation Act of 1977 prohibited Whitney and other owners of coal reserves in alluvial property from mining the reserves. This court held that Whitney had suffered a taking because the legislation and implementing regulations had denied Whitney all economically viable use of its coal rights.

As the trial court found, *Whitney* differs from this case in a critical respect -- there, the coal owner was absolutely precluded from mining. The effect was to deny Whitney all use of the property. In this case, appellants could have retained their use

rights through the payment of a reasonable fee. Again, the fact that appellants could not have paid the fee without outside financing or some other means beyond their present personal cash savings and income, is not dispositive. The issue is whether the fee is objectively reasonable, as we have found it to be.

Contrary to appellants' assertions, the Court of Federal Claims did not base its conclusion that the fee was reasonable on unsupported fact findings concerning whether appellants could have taken various steps to comply with the fee requirement, such as borrowing against the appraised value of their claims, entering into partnership with an investor who could provide sufficient funds, or abandoning or selling some claims. The trial court's conclusion was reached by comparing the fee amount to both the value of assessment work previously required and the appraised value of the mineral claims. In commenting on ways in which appellants might finance payment of the fees beyond using their own resources, the Court of Federal Claims merely recognized that the market is likely to recognize and appreciate valuable mining rights and not be deterred in this respect by a $100 per claim annual fee.

It is important to remember the type of property at issue here. Congress created unpatented mining claims expressly to encourage development and extraction of minerals, i.e., to exploit valuable mineral deposits. It is entirely reasonable for Congress to require a $100 per claim fee in order to assess whether the claim holders believe that the value of the minerals in their claims is sufficiently great to warrant such a payment; and whether claim holders have the resources and desire to develop these claims. If the claims are not valued by the claim holders sufficiently to warrant a $100 fee payment, then the claim holders' decision not to pay the fee eliminates unnecessary encumbrance on public

lands and frees the land for a more valued use. If the claim holder cannot pay a $100 per claim fee, it is unlikely that she would be able solely though her own labor to develop the deposits, thereby frustrating the fundamental purpose in creating rights to unpatented mining claims.

Appellants assert that the fee is not designed to put claim holders to these choices, but instead to raise money for the general Treasury and to wipe out small claim holders. We are not persuaded, particularly in light of Congress' exemption for holders of 10 or fewer claims, *see* 30 U.S. C. § 28k, and the *de minimis* amount of the fee. We conclude, therefore, that the fee was imposed for legitimate public purpose and that the fee is objectively reasonable.

CONCLUSION

Under the applicable standards appellants have not suffered an unconstitutional taking without just compensation. The decision of the Court of Federal Claims is

AFFIRMED.

Each party to bear its own costs.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-776 L
(Filed October 31, 1994)

CHARLES R. KUNKES AND MARGUERITE V. KUNKES,
Plantiffs,

v.

THE UNITED STATES,
Defendant.

Inverse Condemnation; Effect of imposing fees on existing mineral claims.

Lindell R. Church, David W. Ansley, and *Lynn C. Rodgers*, Springfield, Missouri, for plaintiffs.

Marc A. Smith, with whom was *Acting Assistant Attorney General Lois J. Schiffer*, Washington, D.C., for defendant. *Karen Hawbecker*, Washington, D.C., of counsel.

OPINION

BRUGGINK, *Judge*.

This is a claim for a taking under the Fifth Amendment to the Constitution. The action, brought pursuant to the Tucker Act, 28 U.S.C. § 1491 (1988), is before the court on the parties' cross motions for summary judgment. After considering the written and oral arguments, the court concludes that the defendant's motion should be granted and the plaintiffs' motion should be denied.

BACKGROUND[1/]

Under the Mining Act of 1872, 30 U.S.C. § 28-28(e) (1988) ("Mining Act"), mineral claims can be made on federal lands. The claims do not have to be patented to be valid, but they must reflect a discovery of minerals and meet other statutory requirements. Until more recently, the Mining Act required all claimholders to annually perform at least $100 worth of labor or make $100 worth of improvements on each claim in order to preserve an unpatented mining claim. 30 U.S.C. § 28. Failure to satisfy this affirmative obligation resulted in the claim being open to relocation. *Id.*

Additional requirements for claim preservation were imposed on claimholders by the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1701 *et seq.* (1988) ("FLPMA"). In order to preserve their property interest in unpatented mining claims, § 1744(a) required owners to file, prior to December 31 of every year after initial recording, a notice of intention to hold the claim, an affidavit stating that at least $100 worth of labor or improvements had been invested in each unpatented claim during the preceding assessment year, or a detailed reporting form. In addition, § 1744(b) required that all mining claims located prior to FLPMA's enactment be registered with the BLM by filing a copy of the official record of notice or certificate of location. In the event of noncompliance with these filing requirements, FLPMA provided that the claim would be conclusively deemed abandoned by the owner. 43 U.S.C. § 1744(c).

Sixteen years later, Congress once again changed the statutory requirements for preservation of unpatented mining

[1/] The facts are drawn from plaintiffs' complaint and the parties' cross motions for summary judgment.

claims by enacting the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1993. Pub. L. No. 102-381, 106 Stat. 1374 (1992) ("Appropriations Act" or "Act"). This Act suspended the obligations specified in both the Mining Act and FLPMA for assessment years 1993 and 1994. In their place, it required claimants to pay an annual rental fee of $100 per claim, for each of these two years, on or before August 31, 1993. Pub. L. No. 102-381, 106 Stat. 1374, 1378.[2/] *Id.* The Act further provided that a claimant's failure to make timely payment of this rental fee[3/] would conclusively constitute abandonment of its

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[2/] [N]otwithstanding any other provision of law and effective upon the date of enactment of this Act, for fiscal year 1993, for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872, and the filing requirements contained in section 314(a) and (c) of the Federal Land Policy and Management Act of 1976, each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993.

. . . [F]or fiscal year 1994, for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 and filing requirements of FLPMA, each claimant shall, except as provided otherwise by this Act, pay an annual claim rental fee of $100 per claim to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the following assessment year beginning at noon on September 1 . . . .

Pub. L. No. 102-381, 106 Stat. 1374, 1378 (citations omitted).

[3/] The Act required claimholders to pay $200 for each of their unpatented mining claims ($100 for assessment year 1993 and $100 for assessment year 1994).

claim.[4/] Pub. L. No. 102-381, 106 Stat. 1374, 1379. The Act made exceptions for claimants holding ten or fewer claims. Such claimants remained subject only to the claim preservation requirements of the Mining Act and FLPMA. Pub. L. No. 102-381, 106 Stat. 1374, 1378-79.

Over a period beginning in 1969 and ending in 1991, the Kunkes accumulated approximately 575 contiguous mining claims in Mohave County, Arizona. For purposes of ruling on defendant's motion, the court assumes that the claims were valid prior to August 31, 1993. The plaintiffs attach to their motion for summary judgment two appraisals of the value of minerals on the claims. The minerals assessed are primarily gold and silver. A June 1994 appraisal exclusively of the Van Deeman mine places a gross value of the mineral reserves at $127,000,000. It estimates net, pre-tax income at approximately $59,000,000. Another appraisal of the balance of the minerals, dated May 1994, estimates a net value of $25,593,160. This appraisal recites that "the estimated potential net value clearly justifies expenditures for exploration and delineation of reserves."

Plaintiffs complied with the annual filing requirements imposed by FLPMA for each assessment year up to and including

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[4/] "[F]ailure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant . . . ." Pub. L. No. 102-381, 106 Stat. 1374, 1379. Despite this clear language, the Government submits that plaintiffs' mining claims still appear on BLM's active status list. BLM has not sent a voidance decision to plaintiffs regarding the status of these mining claims and has made no determination regarding their validity under the general mining laws. Consequently, the Government contends that plaintiffs' takings claim may not be ripe for adjudication. Because the court grants the Government's motion on other grounds, it is not necessary to address this contention.

1992.[5/] For fiscal years 1993 and 1994, however, the Appropriations Act required plaintiffs to pay the aforementioned rental fee for each of their unpatented claims. P.L. 102-381, 106 Stat. 1374, 1378. The total fee on plaintiffs' claims under this Act was $115,000. As a result of their failure to pay, plaintiffs' claims were deemed abandoned.

THE PARTIES' CONTENTIONS

Plaintiffs allege that they were financially unable to pay the fees required by the Appropriations Act.[6/] They live on modest fixed incomes and have no significant assets other than the mining claims. The court accepts that they would be personally unable to pay the $115,000 in fees. Although they admit that Congress had the power to prescribe this type of fee, they argue that because the burden imposed by the Act was so unreasonably

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[5/] In addition, plaintiffs allege that they complied with all of the requirements imposed by the Mining Act. Defendant has not challenged this allegation.

[6/] Whether or not plaintiffs were able to afford the payments required by the Appropriations Act is apparently not critical to their argument. Plaintiffs assert that the loss of their claims would still have constituted an unlawful taking, regardless of their financial ability to make the payments. As a result of the prior regulatory requirements under the Mining Act and FLPMA, plaintiffs argue that an expectancy was created whereby they could own and preserve unpatented mining claims by expenditure of their labor and efforts only. That expectancy was destroyed when defendant imposed the $100 rental fee requirement. Consequently, plaintiffs contend that this loss of expectancy would have resulted in an unconstitutional taking by the Government even if they had the necessary funds available but simply chose not to pay the fee.

severe as to render it impossible for them to comply,[7/] the result was a taking entitling them to just compensation under the Fifth Amendment. Plaintiffs contend that the Government deliberately set out to reacquire their claims for its own benefit and that Congress imposed the fee knowing that many owners would be unable to comply. They seek $575 million in damages.

The government counters that no taking has occurred on these facts because the rental fee imposed by the Appropriations Act was a reasonable regulatory condition prescribed by Congress for the continued retention of unpatented mining claims. It emphasizes that the rental fee requirement placed substantially the same burden on plaintiffs as did the prior regulatory scheme under the Mining Act and FLPMA. In both cases, plaintiffs were required to expend $100 annually on each claim. The Government asserts that the fee obligation was a *de minimis* financial burden not rising to the level of a regulatory taking.

DISCUSSION

There is no question that mining claims are "private property" enjoying the protection of the Fifth Amendment. *Freese v.*

[7/] To further demonstrate the severity of the burden imposed by the Appropriations Act, plaintiffs allege in their reply brief that information released by the Bureau of Land Management shows that, prior to August 31, 1993, there were over 1.1 million unpatented mining claims located on public lands in the United States. Subsequent to the enactment of the Appropriations Act, however, in excess of 850,000 of these claims were lost by reason of nonpayment of the claim rental fee. This loss represented approximately seventy-five percent of the total claims outstanding. Plaintiffs argue that these data suggest that an entire class of claimholders was eliminated due to inability to pay, leaving only the small miners who were exempted from payment and the large mining companies. The original materials to support these allegations are not included in the motion papers. Nevertheless, for the purpose of ruling on defendant's motion for summary judgment, the court will assume those facts to be true.

United States, 639 F.2d 754, 757 (Ct. Cl. 1981). According to the court in *Oil Shale Corp. v. Morton*, 370 F. Supp. 108 (D. Colo. 1973), "[a] mining claim is an interest in land which cannot be unreasonably or unfairly dissolved at the whim of the Interior Department. Once there is a valid discovery and proper location, . . . [it] is 'real property in the highest sense.'" *Id.* at 124 (quoting *Forbes v. Gracey*, 94 U.S. 762, 767 (1876)). Although legal title to the land remains in the United States, the claimant enjoys a valid, equitable title in the claim, possessing all of the incidents of real property. *Oil Shale Corp.*, 370 F. Supp. at 124.[8/] Accordingly, the Takings Clause limits the Government's ability to impose forfeitures on valid mining claims.

As far as the court is aware, the Supreme Court has not been asked to address a direct challenge to the constitutionality of the Mining Act's requirement that $100 worth of labor or improvements must be made on a claim annually. Presumably this is because its constitutionality is a foregone conclusion. If Congress creates a property right, it perforce has broad powers to limit that right. Anyone accepting the property would of necessity take subject to those limitations. *See Van Sice v. Ibex Mining Co.*, 173 F. 895, 896 (9th Cir. 1909). The question thus arises: Is an uncompensated forfeiture precipitated by the additional restrictions placed on existing claimholders by the Appropriations Act a violation of the Fifth Amendment?

The Supreme Court went a substantial distance towards answering that question in the negative in *United States v. Locke*,

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8/ Nevertheless, the Department of the Interior plays a significant role in the regulation of unpatented mining claims. Not only does the Department have plenary authority over the administration of all public mineral lands, it also has been given broad authority to issue regulations affecting these lands. *Hafen v. United States*, 30 Fed. Cl. 470, 473 (1994).

471 U.S. 84 (1985), a case involving the constitutionality of FLPMA. Before examining that case, however, it must be put in context by considering *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), upon which the majority in *Locke* relied heavily. In *Texaco*, the Indiana Dormant Mineral Interest Act, Ind. Code §§ 32-5-11-1 through 32-5-11-8 (1976), provided that any severed mineral interest that remained unused for a period of twenty years would automatically lapse and revert to the current surface owner of the property, unless the mineral owner filed a statement of claim prior to the end of the twenty year period or within a two year grace period after the effective date of the statute. 454 U.S. at 518-19. Texaco, whose unused mineral interests had lapsed upon expiration of the grace period under the Act, challenged the constitutionality of the Indiana Statute, arguing that it effected a taking of property for public use without just compensation. *Id.* at 521-23.

Holding that the Indiana Act did not effect an unconstitutional taking, the Court explained that "just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of the property right on the performance of reasonable conditions that indicate a present intention to retain the interest." *Id.* at 526.[9/] In denying compensation to Texaco, the Court explained that it had never required the state to compensate the owner of an abandoned or lapsed private property interest for the consequences of his own neglect. *Id.* at 530. The Court emphasized that it was Texaco's failure to make any use of the property that caused the lapse of the property right, not the action of the state. *Id.*

[9/] The Court stressed that the state had not exercised its power in an arbitrary manner and that each of the actions required by the statute to avoid an abandonment of the mineral interest furthered a legitimate state goal. *Texaco*, 454 U.S. at 529.

This approach was again used by the Court in *United States v. Locke*, 471 U.S. 84 (1985). There, the Court addressed a regulatory takings challenge to § 1744 of FLPMA. Claimholders whose claims had been declared abandoned and void due to tardy filing[10/] brought suit alleging that § 1744(c) effected an unconstitutional taking of their property without just compensation. *Id.* at 91.

Ultimately holding that the application of § 1744(c) did not constitute a taking by the United States Government, the Court reasoned that:

> [e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.

Id. at 104. In light of these principles, the Court concluded that "there can be no doubt that Congress could condition initial receipt of an unpatented mining claim upon an agreement to

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[10/] According to § 1744(a), a notice of intention to hold claim, an affidavit of assessment work performed on the claim, or a detailed reporting form must be filed with the BLM "*prior to* December 31." 43 U.S.C. § 1744(a) (emphasis added). The claimholders in this case, however, filed their paperwork *on* December 31. *Locke*, 471 U.S. at 89-91.

perform annual assessment work and make annual filings." *Id.* at 105.[11/]

In reaching its decision, the Court emphasized that Congress' power to qualify existing property rights is particularly broad with regard to unpatented mining claims, because although owners hold fully recognized possessory interests in their claims, the United States remains the owner of the underlying fee title to the public domain upon which such claims are located. *Id.* at 104. As a result, the United States "maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. . . . Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests." *Id.* at 104-05.

The Court made clear that "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." *Id.* at 107. Because the aggrieved claimants failed to inform themselves of the proper filing deadline and failed to timely file the documents required by federal law, the Court concluded that the property rights were extinguished by the claimants' untimely filing, not the action of Congress. *Id.*

11/ The fact that these filing requirements were applied to vested claims (i.e., claims that existed prior to the enactment of FLPMA) was deemed insignificant by the Court because any retroactive application was found to be supported by "a legitimate legislative purpose furthered by rational means." *Locke*, 471 U.S. at 105 (quoting *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984). Of great import to the Court was that the statutory requirement for continued retention of mining claims imposed only a minor burden on claimants (i.e., filing a paper once a year indicating either an intention to hold the claim or that the required assessment work had been performed)." *Locke*, 471 U.S. at 106.

The principle the court draws from these decisions is that Congress retains the affirmative power to change the conditions for continued ownership of mineral claims, assuming that power is reasonably exercised. This power inheres in the Government's underlying fee ownership and in Congress' general regulatory powers. The owners of claims thus hold their interests subject to possible forfeiture if they fail to comply with reasonable, new regulatory constraints. The factors pointing to the reasonableness of the limitations in *Locke* and *Texaco* were the degree to which it was convenient to comply, the extent of adherence to principles of procedural due process, and whether there was a legitimate governmental interest involved. Application of the same considerations here compels a rejection of plaintiffs' claim.

The court recognizes that the present facts carry the issue beyond either *Locke* or *Texaco*. In those two cases, the Court could find fault in the claimants' failure to comply with the administrative requirements. Here, all of the Kunkes' claims were extinguished due to their failure to pay the filing fees. There was no neglect involved on their part because they were personally unable to pay the entire amount. While in theory the burden imposed by the Appropriations Act is no more severe than the burden originally imposed by the Mining Act, the material difference between the present circumstances and those that existed prior to the Appropriations Act is that claimants were no longer permitted to satisfy the $100 improvement per claim requirement by either providing in-kind labor themselves or through the value of exploration work done by others. Plaintiffs stress that under the Mining Act they were able to obtain third party assistance to satisfy the statutory requirement. Consequently, they did not have to expend $57,500 of their own labor or resources each year. The Appropriations Act raised the level of commitment by calling for a cash payment of $200 per claim

prior to the August 1993 deadline.

Claimholders have always been subject to some ongoing proof of their interest in developing the mineral resources of their claims. Although the Appropriations Act raised the ante, it did so in a way that cannot be considered substantially different in kind or degree from what had previously been required. It was plainly motivated by the same purpose, namely, elimination of stale or worthless claims. H.R. Rep. No. 626, 102nd Cong., 2d Sess. 14 (1992). The Supreme Court has held that this is a legitimate governmental interest. *Locke*, 471 U.S. at 105-06; *see also, Hickel v. Oil Shale Corp.*, 400 U.S. 48, 56 (1970).

Nor can it be said that the fee requirement is unreasonable in its financial impact. What changed was the nature of the obligation -- from $100 worth of labor or improvements to a $100 claim rental fee per year. In the years intervening between the Mining Act and the Appropriations Act, there had been no adjustment for the decline in the value of money. It would have been unreasonable to assume that Congress would forever ignore the depreciating value of the level of commitment that a claimant had to demonstrate. In addition, Congress made some effort to moderate the impact of the fee requirement by exempting holders of ten or fewer claims.

While the court accepts at face value that the Kunkes could not have paid the fees themselves, they themselves value the minerals encumbered by the 575 claims at over $80 million. It is unrealistic, in light of that circumstance, for the court to ignore other possibilities left open by the Appropriations Act. There is nothing in the Act, for example, that prohibits plaintiffs from obtaining third party funding to satisfy the rental fee requirements. They could have either borrowed on the value of the minerals or

entered into a partnership with other investors contributing cash. The Kunkes also could have abandoned the least promising claims and paid fees on a smaller number, or they could have sold some of the claims and used the proceeds to pay fees on the balance. The court is forced to conclude that the Kunkes either unnecessarily chose to abandon valuable mineral interests or that the claims were not worth maintaining. This is plainly the choice that Congress envisioned forcing on claimholders. It was not unreasonable in doing so. A $100 fee is not unreasonable when compared to substantial mineral value. The $100 fee only becomes disproportionate when compared to maintaining a worthless or marginal claim.

It is not an answer to compare the value of the claims against the cumulative cost of annual payments of a $100 fee per claim. As the Court taught in *Locke*, Congress has a legitimate interest in eradicating stale claims. If a piece of property has no economic value, then the pendency of a stale claim unnecessarily encumbers the property. A claim on a piece of property with no economically viable mineral interests is not in fact a valid claim. If, on the other hand, a piece of land does contain recoverable mineral interests of sufficient value to perfect a claim, then a $100 fee is inherently reasonable. It is certainly not confiscatory. As the Kunkes demonstrated by their appraisals, a relatively small amount of money can support claims of substantial size.

The present facts are totally unlike those of *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), a case upon which plaintiffs rely. In *Whitney*, the Surface Mining Control and Reclamation Act[12/] expressly prohibited the extraction of coal from a location the claimant had long believed it was entitled to

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[12/] 30 U.S.C. §§ 1201 *et seq.* (1988).

mine. *Id.* at 1172-74. The purpose of the statute was to prohibit mining. The only way to comply was by not doing so. In the present case, the Appropriations Act itself did not prohibit any activity. Plaintiffs could have complied by paying the fee.

In *Whitney*, the trial and appellate courts found a reasonable, investment-backed expectation that mining could take place. *Id.* at 1174-75. Under the Appropriation Act, a claimholder's non-payment of a modest fee speaks volumes about the investment potential of a claim. It was not unreasonable for Congress to conclude that those claims not worth paying $100 per year to keep should be forfeited as worthless. As the Kunkes' appraisals make clear, development of mineral resources requires substantial investments of money. The potential return might be great, but so is the cost. Congress reasonably concluded that claimholders not willing to invest $100 per year for two years, or unable to get investment backing to that extent, do not have a reasonable, investment-backed expectations in their claims. Forfeiture of those claims does not require compensation.

Plaintiffs do not argue that the statute violates procedural due process or that they were excusably unaware of its requirements. There being no other ground for finding a taking, the court holds that the $100 claim rental fee imposed by the Appropriations Act was a reasonable regulatory restriction.

CONCLUSION

Forfeiture of plaintiffs' claims due to their failure to pay the claim rental fees did not constitute a taking without just compensation. Plaintiffs' motion for summary judgment is therefore denied, and defendant's motion for summary judgment is granted. The Clerk is directed to enter judgment dismissing the complaint. No costs.

/s/ Eric G. Bruggink
ERIC G. BRUGGINK
Judge

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-5031

CHARLES R. KUNKES and
MARGUERITE V. KUNKES
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 93-776 L

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED _____ /s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: May 6, 1996

The Mining Act of 1872, 30 U.S.C. § 28-28(e), provides as follows:

§ 28. Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or improvements on claims pending issue of patent; co-owner's succession in interest upon delinquency in contributing proportion of expenditures; tunnel as lode expenditure

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been

made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made their required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of September succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.

§ 28-1. Inclusion of certain surveys in labor requirements of mining claims; conditions and restrictions

The term "labor", as used in the third sentence of section 28 of this title, shall include, without being limited to, geological, geochemical and geophysical surveys conducted by qualified experts and verified by a detailed report filed in the county office in which the claim is located which sets forth fully (a) the location of the work performed in relation to the point of discovery and boundaries of the claim, (b) the nature, extent, and cost thereof, (c) the basic findings therefrom, and (d) the name, address, and professional background of the person or persons conducting the work. Such surveys, however, may not be applied as labor for more than two consecutive years or for more than a total of five years on any one mining claim, and each such survey shall be nonrepetitive of any previous survey on the same claim.

(Pub.L. 85-876, § 1, Sept. 2, 1958, 72 Stat. 1701.)

§ 28-2. Definitions

As used in section 28-1 of this title,

(a) The term "geological surveys" means surveys on the ground for mineral deposits by the proper application of the principles and techniques of the science of geology as they relate to the search for and discovery of mineral deposits;

(b) The term "geochemical surveys" means surveys on the ground for mineral deposits by the proper application of the principles and techniques of the science of chemistry as they relate to the search for and discovery of mineral deposits;

(c) The term "geophysical surveys" means surveys on the ground for mineral deposits through the employment of generally recognized equipment and methods for measuring physical differences between rock types or discontinuities in geological formations;

(d) The term "qualified expert" means an individual qualified by education or experience to conduct geological, geochemical or geophysical surveys, as the case may be.

§ 28a. Omitted

§ 28b. Annual assessment work on mining claims; temporary deferment; conditions

The performance of not less than $100 worth of labor or the making of improvements aggregating such amount, which labor or improvements are required under the provision of section 28 of this title to be made during each year, may be deferred by the Secretary of the Interior as to any mining claim or group of claims in the United States upon the submission by the claimant of evidence satisfactory to the Secretary that such mining claim or group of claims is surrounded by lands over which a right-of-way for the performance of such assessment work has been denied or is in litigation or is in the process of acquisition under State law or that other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof.

§ 28c. Length and termination of deferment

The period for which said deferment may be granted shall end when the conditions justifying deferment have been removed: *Provided,* That the initial period shall not exceed one year but may be renewed for a further period of one year if justifiable conditions exist: *Provided further*, That the relief available under sections 28b to 28e of this title is in addition to any relief available under any other Act of Congress with respect to mining claims.

§ 28d. Performance of deferred work

All deferred assessment work shall be performed not later than the end of the assessment year next subsequent to the removal or cessation of the causes for deferment or the expiration of any deferments granted under sections 28b to 28e of this title and shall be in addition to the annual assessment work required by law in such year.

§ 28e. Recordation of deferment

Claimant shall file or record or cause to be filed or recorded in the office where the notice or certificate of location of such claim or group of claims is filed or recorded, a notice to the public of claimant's petition to the Secretary of the Interior for deferment under sections 28b to 28e of this title, and of the order or decision disposing of such petition.